

**Phillips Petroleum Company and Paper, Allied-Industrial, Chemical & Energy Workers International Union Local 8-590.** Case 19-CA-28114

July 31, 2003

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On December 11, 2002, Administrative Law Judge Jay R. Pollock issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record<sup>1</sup> in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions except as set forth below, and adopts the recommended Order.

**Introduction**

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Brandon Ingram for attempting to obtain family and medical leave. According to the judge, Ingram's activity was protected under the Act because it constituted the invocation of a provision of the collective-bargaining agreement.<sup>3</sup> We adopt the judge's finding that the Respondent unlawfully terminated Ingram for his efforts to obtain family medical leave. We need not pass, however, on whether Ingram's activities amounted to an attempt to enforce provisions of the collective-bargaining agreement. As shown below, we find that Ingram's conduct constituted protected concerted activity even apart from the issue of whether it implicated any provision of the collective-bargaining agreement.<sup>4</sup>

<sup>1</sup> We grant the General Counsel's unopposed motion to amend the transcript.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> More specifically, the judge found that Ingram's efforts to obtain sick leave under Federal and State law implicated a clause in the collective-bargaining agreement which incorporated Federal and State law. He therefore concluded that Ingram was engaged in protected concerted activity. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984) (employee's efforts to invoke rights grounded in the collective-bargaining agreement constitute protected concerted activity).

<sup>4</sup> The complaint alleged that the Respondent's conduct violated Sec. 8(a)(3) and (1) of the Act. However, counsel for the General Counsel withdrew the 8(a)(3) allegation at the start of the hearing.

**Applicable Facts**

The Respondent<sup>5</sup> operates an oil refinery in Ferndale, Washington. The employees at the refinery have long been represented by the Union, which most recently entered into a collective-bargaining agreement with the Respondent in February 2002. The collective-bargaining agreement provides that probationary employees are subject to all provisions of the agreement, except that termination of an employee within the first 180 days of employment is not subject to the grievance procedures.

Employee Brandon Ingram was hired as an assistant operator in December 2001, and began working as a probationary employee along with four other employees. During the first week of training, Ingram was linked to three incidents on which the Respondent eventually relied to justify Ingram's discharge. First, Ingram deleted two e-mails sent by the Respondent from his computer without reading them. Ingram had been having trouble with his computer and had previously read the e-mails from another employee's computer. Believing that Ingram had deleted the e-mail without reading it, Personnel Services Supervisor Brenda Hill (the author of the two deleted e-mails) sent Ingram an e-mail reminding him that he is required to read his e-mail. Ingram had no further incidents regarding e-mails.

Next, during a training session conducted by scheduling clerk Jeff Davis, an unidentified employee stated that an employee could avoid a call-in for overtime by simply stating that he had been drinking. Though Davis did not attribute the statement to Ingram, Labor and Security Superintendent John Strachan determined that the statement sounded like something that would come from Ingram, and accordingly attributed the statement to him. Finally, during a safety training session, Ingram asked a question indicating a belief that employees did not need to wear hard hats on the loading dock. Supervisor Nona Wegers immediately answered, and explained that employees were required to wear hard hats in that area. Ingram received no discipline for any of these incidents when they occurred.

After Ingram completed 3-4 weeks of basic operator training, he was assigned to the "off-plot" area of the refinery, and later qualified as a loader and diesel loader. Throughout his 6-month tenure as a probationary employee, Ingram was consistently rated as a "good" employee in his monthly evaluations, and one supervisor described him as a "hard worker" and a "welcome member of my crew." Ingram also volunteered for overtime on the oil spill team.

<sup>5</sup> The Respondent is now known as ConocoPhillips Company.

In February 2002,<sup>6</sup> Ingram informed his supervisor that his wife was experiencing complications with her pregnancy, and that he might need to take time off on short notice. Fellow employee Wendy Wampler told Ingram that he might be eligible for time off under the Family Medical Leave Act (FMLA). Ingram then contacted John Strachan about the matter. Strachan responded that Ingram did not qualify under the FMLA because he did not meet the minimum 1-year employment requirement.

Thereafter, Wampler advised Ingram to research whether the Washington State Family Care Sick Leave Act might entitle him to use his sick leave to care for family members. After Ingram researched the statute, he became convinced that it applied to him. He also began discussing the issue with several other operators in his unit, and he attempted to educate them about their family medical leave rights because he found that many of the employees were unaware of these rights. Ingram again contacted Strachan and scheduling clerk Jeff Davis to inquire about his eligibility under this law. Strachan cut Ingram off, stating bluntly that Ingram “did not qualify for any of these items” and that he would have to use vacation to take time off.

In late March/early April, Ingram began discussing the family leave issue with Bob Huntley, a coworker who held a leadership position in the Union. Huntley informed Ingram that other employees had previously experienced problems getting time off to care for sick family members.<sup>7</sup> Huntley encouraged Ingram to “speak up” and to continue pursuing the issue, noting that the Union was searching for a test case. Additionally, other unit employees told Ingram that they had been denied family leave in the past and “hadn’t really been given a reason.” Ingram decided thereafter to “be vocal and advocate for our right.”

On April 11, Ingram’s wife began having medical problems and was hospitalized. The Respondent approved Ingram’s request for 2 days’ sick leave, and, after initially denying him further leave, subsequently approved Ingram’s request to stay off work for two additional days. When Ingram returned to work on his next scheduled workday, he was informed that he had been charged for 4 days’ vacation time. Ingram protested this action in an e-mail to Strachan, Davis, and union com-

mittee member and coworker Rachelle Honeycutt. Strachan repeated in an e-mail response to Ingram that he did not qualify for sick leave under the FMLA because he had not been employed by the Respondent for 1 year. While Strachan did not directly respond to Ingram’s inquiry as to whether the Washington State law would apply, he further informed Ingram that the Respondent’s policies regarding sick leave would not change (as a result of the Respondent’s imminent merger with Conoco) until January 2003.

Later that day, Ingram was called into a meeting with three management officials and Union Representative Michael Brown. Area Superintendent Bruce Brock told Ingram that he had angered Strachan by pursuing a claim for sick leave, that he was to use the chain of command, and that he was not to contact Strachan any longer. Brock added that Ingram was a good employee and would have no troubles if he abided by the directions of this meeting.

Ingram’s conduct prompted a flurry of e-mails among the Respondent’s officials. On April 19, Strachan forwarded Ingram’s e-mail (protesting being charged 4 days’ vacation) to several other management officials. Strachan’s e-mail said that he was “pretty discussed at having to deal with [Ingram] at this point,”<sup>8</sup> and added that Ingram was “trying to get the Union involved already.” In another e-mail on April 22, Strachan wrote to Production Manager Tim Murphy that “this guy is challenging us at every turn.” On April 23, Murphy sent an e-mail stating, in pertinent part, that “[r]egardless of work performance, I do not believe that we need a ‘political activist’ at work.” In addition, on April 24, Strachan notified Murphy that Ingram had filed a complaint against the Respondent with the Department of Labor.

On May 10, Ingram was discharged. The letter of termination cited the following reasons for the termination:

- (1) During new hire orientation . . . you advised attendees that all an operator has to do to avoid coming in for overtime is to tell the caller that you have been drinking;
- (2) During the initial weeks of your probationary period, you repeatedly deleted important e-mail without reading it. . . .
- (3) During Basic Operator Training . . . you openly disagreed with the PPE standard presented [i.e. the safety standard related to wearing hard hats] and advised the other attendees that a different standard really existed . . .
- (4) On another occasion, you indicated to the training supervisor that you should

<sup>6</sup> All dates hereafter are in 2002.

<sup>7</sup> In 1999, the Union filed a grievance on behalf of employee Doug Deather, asserting that the Respondent’s refusal to grant him family leave was unlawful. The Respondent prevailed against the Union in the grievance arbitration, asserting that the law did not cover its employees because its sick leave policy did not fit the definition of an accrued plan.

<sup>8</sup> It is clear from the context of Strachan’s e-mail that he intended to write that he was “pretty *disgusted* at having to deal with [Ingram]” (emphasis added).

be paid Assistant Operator II pay, because you perform more work than the diesel loader . . . (5) You have indicated frustration with regard to the Company's time off policies both through argumentative discussions with Company personnel and in writing to the Labor Relations Superintendent.

#### Analysis

As shown below, we find that Ingram's pursuit of family medical leave rights constituted protected concerted activity. We further find, applying *Wright Line*,<sup>9</sup> that Ingram's protected conduct was a motivating factor in the Respondent's decision to terminate him. Finally, we find that the Respondent has failed to establish that it would have terminated Ingram in the absence of his protected conduct.

##### (a) Ingram's conduct was protected and concerted

Section 7 of the Act protects the right of employees to engage in concerted activity for their mutual aid and protection. It is well settled that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity."<sup>10</sup> Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing . . . group action."<sup>11</sup> The Board has also found concerted conduct when an individual attempts to bring a group complaint to the attention of management.<sup>12</sup>

Based on the above-summarized facts, we find that Ingram engaged in protected concerted activity to remedy a perceived inadequacy in working conditions, i.e., the inability of employees to use sick leave for family medical emergencies. Although Ingram's efforts to secure sick leave originated because of his need to care for his wife and children, the record clearly establishes that Ingram's efforts embraced the larger purpose of obtaining this benefit for all of his fellow employees. Thus, after a coworker informed him about State and Federal family and medical leave legislation, Ingram became convinced that he and his coworkers were entitled to use sick leave for family medical emergencies under these laws.

<sup>9</sup> See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

<sup>10</sup> *Cibao Meat Products*, 338 NLRB 934 (2003) (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)).

<sup>11</sup> *Id.* (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). Accord: *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

<sup>12</sup> See *Meyers II*, 281 NLRB at 885, 887.

Thereafter, Ingram discussed the subject of changing the Respondent's sick leave policy with his coworkers, in order to educate them and solicit their support. In so doing, he discovered that the employees had previously supported the Union's efforts to attain such benefits on behalf of another employee and that they were interested in pursuing the issue again. Some of his coworkers voiced their frustration that they had been denied family leave in the past without being given a reason. Additionally, at least one employee actively encouraged Ingram to "speak up" and pursue this issue. Thus, in repeatedly attempting to convince the Respondent to modify its sick leave policies, Ingram was acting not only on his own behalf, but also on behalf of his coworkers.<sup>13</sup>

##### (b) The Respondent's animus towards Ingram's concerted conduct

We find that the record amply supports a finding that Ingram's protected concerted conduct was a "motivating factor" in the Respondent's decision to terminate Ingram.<sup>14</sup> As noted above, Ingram's efforts to change the Respondent's family medical leave policy were the subject of several e-mails among the Respondent's officials. These e-mails were very critical of Ingram's conduct. Most revealing of the Respondent's animus was the e-mail of Production Manager Tim Murphy, who wrote: "Regardless of work performance, I do not believe that we need a 'political activist' at work." This statement clearly conveys that the Respondent (a) was aware that Ingram was either acting on behalf of his fellow employees or attempting to solicit their support,<sup>15</sup> and (b) harbored considerable animosity towards those efforts.

This statement becomes even more significant when considered in the context of the Respondent's prior consideration of its family medical leave policy. As noted above, the Respondent had successfully denied a recent grievance brought by the Union over the family medical leave issue. Against this backdrop, the Respondent further revealed its animosity towards Ingram's conduct when Strachan lamented in his e-mail that, in pursuing the family medical leave issue, Ingram was "trying to get the Union involved." This remark, especially when considered together with the "political activist" remark, further reveals the Respondent's concern that Ingram was

<sup>13</sup> See, e.g., *NLRB v. Caval Tool Division*, 262 F.3d 184, 190 (2d Cir. 2001) (enforcing Board order finding employee complaint about working conditions made in group meeting was protected concerted conduct on behalf of the group); *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987) (same).

<sup>14</sup> See *Wright Line*, 251 NLRB at 1089.

<sup>15</sup> Indeed, from Ingram's e-mail communications Respondent knew that Ingram was informing coworker and Union Official Honeycutt of his leave dispute.

doing far more than pursuing a wholly personal claim. Indeed, when considered in context, it further reveals the Respondent's knowledge of and animus towards Ingram's protected concerted activity.<sup>16</sup>

Further, the Respondent's termination letter to Ingram clearly cites his efforts to change the Respondent's policies as one of the reasons that the Respondent decided to terminate him. Thus, the Respondent wrote: "you have indicated frustration with regard to the Company's time off policies, both through argumentative discussion with Company personnel and in writing to the Labor Relations Superintendent." Although the Respondent, at the hearing, and again on brief, disavowed this justification for the discharge, the termination letter, when considered together with the Respondent's e-mails, clearly reveals the Respondent's animosity towards Ingram's efforts.<sup>17</sup>

From this conduct, we find that the General Counsel has sustained his burden of showing that Ingram's protected concerted activity was a motivating factor in the Respondent's decision to terminate him. The burden thus shifts to the Respondent to show that it would have terminated Ingram even in the absence of his protected concerted activity.

*(c) The Respondent's defense*

The Respondent maintains that it discharged Ingram because of concerns about his ability to follow safety instructions, as reflected by the first three incidents noted in the termination letter: (1) Ingram's alleged comment about drinking to avoid overtime, (2) Ingram's questioning the need for a hardhat in the loading dock area during training, and (3) Ingram's deletion of a work-related e-mail without reading it first. However, all of these events occurred nearly 6 months earlier, during Ingram's first week of training, and Ingram received no discipline for any of these events contemporaneous with their occurrence. The Respondent's minimal response to those incidents supports the judge's conclusion that the Respondent did not view them as serious infractions when they occurred.<sup>18</sup>

<sup>16</sup> It is well established that union activity is "by definition . . . concerted within the meaning of Sec. 7 of the Act without regard to the fact that [an employee] may have acted alone." *C & D Charter Power Systems*, 318 NLRB 798 (1995) (quoting *Carpenters Local 925*, 279 NLRB 1051, 1059 fn. 40 (1986)), enf. mem. 88 F.3d 1278 (D.C. Cir. 1996), cert. denied 519 U.S. 1006 (1996).

<sup>17</sup> Indeed, the Respondent's subsequent attempts to minimize this basis for discharge are further evidence of its unlawful motivation. See *Abbey's Transportation Service v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988) (employer's "shifting assertions" justifying discharge support inference of unlawful motivation); *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

<sup>18</sup> A closer look at the alleged incidents reveals why the Respondent did not take them seriously at the time. Indeed, as the judge found, Ingram was falsely accused of making the overtime comment, and the

Finally, the Respondent's decision to terminate Ingram was not consistent with its treatment of other probationary employees in his class, two of whom had been identified as potentially having performance and attitude problems. In an e-mail written by Strachan evaluating the employees shortly before the end of the probationary period, Strachan criticized three of the probationary employees (including Ingram). Strachan wrote that one employee allegedly had "an attendance problem," and possibly "an attitude problem." He further noted that another employee had been issued an "attitude adjustment" for his failure to qualify as an operator and was on the "watch list." Similarly, Ingram was described in that same e-mail as having a "definite budding attitude problem." Despite the fact that all three received similar remarks, only Ingram was dismissed.<sup>19</sup> The Respondent's failure to terminate the two other probationary employees who were identified as having "attitude" problems further undermines the Respondent's contention that Ingram would have been terminated even in the absence of his protected activity.

In sum, we find that the General Counsel has established that the Respondent terminated Ingram in part for his protected concerted activity, and that the Respondent has failed to show that it would have terminated Ingram even in the absence of that activity. Accordingly, we find the Respondent violated Section 8(a)(1) by discharging Ingram.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Phillips Petroleum Company, Ferndale, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Respondent never attempted to verify that Ingram made the comment before including it in his termination letter. Further, the Respondent merely corrected Ingram's misperception about wearing the hardhat immediately and never raised the issue again. Additionally, although Ingram did delete company e-mail in the first few days of work, as alleged, his supervisor acknowledged that this may have been a mistake (due to lack of training) and that no further incident occurred.

<sup>19</sup> We also reject the Respondent's assertion that the judge applied the wrong standard in evaluating the lawfulness of Ingram's discharge because he was a probationary employee. Although an employer has a wide degree of discretion with respect to its decision to discharge a probationary employee, an employer is not entitled to terminate a probationary employee for discriminatory reasons. It is well established that probationary employees are entitled to the full protection of the Act. See *General Battery Corp.*, 241 NLRB 1166, 1174 (1979).

*Jo Anne Howlett and Eddie E. Clopton Jr., Esq.*, for the General Counsel.

*Robert A. Blackstone and Douglas Morrill, Esqs. (Davis Wright Tremaine, LLP)*, of Seattle, Washington, for the Respondent.

*Rachelle Honeycutt, Vice President*, of Deming, Washington, for the Union.

## DECISION

### STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Bellingham, Washington, on October 22 and 23, 2002. On June 27, 2002, Paper, Allied-Industrial, Chemical & Energy Workers International Union, Local 8-590 (the Union) filed the charge alleging that Phillips Petroleum (the Respondent)<sup>1</sup> committed certain violations of Section 8(a) (1) of the National Labor Relations Act (the Act)). The Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing on August 30, 2002, against Respondent alleging that Respondent violated Section 8(a)(1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,<sup>2</sup> and having considered the posthearing briefs of the parties, I make the following

### FINDINGS OF FACT AND CONCLUSIONS

#### I. JURISDICTION

Respondent is a State of Delaware corporation with offices and a place of business in Ferndale, Washington, where it has been engaged in the operation of an oil refinery. In the 12 months prior to the issuance of the complaint, Respondent sold and shipped goods, valued in excess of \$50,000, from its Ferndale refinery to customers outside the State of Washington. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent through its subsidiary, Tosco Corporation, operates an oil refinery in Ferndale, Washington. The employees at the refinery have been represented for collective-bargaining purposes by the Union for many years. The parties entered into

their most recent collective-bargaining agreement on February 1, 2002. The collective-bargaining agreement provides that probationary employees are subject to all provisions of the agreement except that termination of an employee within the first 180 days of employment is not subject to the grievance procedure.

Brandon Ingram was hired on December 10, 2001, as an assistant operator, and began as a probationary employee along with four other probationary employees. Upon being hired, the five probationary employees received 3 to 4 weeks of basic operator training.

During the first week of training, Jeff Davis, scheduling clerk, gave an orientation concerning schedules, rotating shifts, vacation, and sick pay. During Davis' presentation concerning mandatory overtime, one of the employees stated that mandatory overtime could be easily avoided. The employee told Davis and the other probationary employees in the class that an employee could avoid a call in for overtime by simply stating that he had been drinking. Davis acknowledged that Respondent would not require a person who was drinking to come into work. Davis and Ingram both credibly testified that Ingram did not make this statement. Notwithstanding this fact, Respondent claims that Ingram, who does not drink, told the other probationary employees that they could use drinking as an excuse to avoid overtime.

Davis reported to John Strachan, Respondent's labor and security superintendent, that one of the probationary employees had made the remark about using drinking as an excuse to avoid mandatory overtime. Davis did not name the offending employee. Strachan said, "[T]hat sounds like something Dan Ingram [Brandon Ingram's father and a 30-year employee] would tell his son."<sup>3</sup> Davis, not wanting to identify the employee who made the remark, did not respond.<sup>4</sup> My findings are based on Davis' credible testimony. As discussed more fully below, I do not credit Strachan's version of his conversation with Davis.

On Ingram's third day of training he deleted two e-mails from his computer without opening them. Ingram was having trouble with his computer terminal and read the e-mails from a computer assigned to another probationary employee. However, Ingram did delete the e-mails from his machine. Brenda Hill, Respondent's personnel services supervisor, believing that Ingram did not read the e-mails, sent Ingram an e-mail severely warning Ingram that it was important for the employee to read his e-mails. Thereafter, there were no further incidents regarding the reading of e-mails.

During a safety training session with Nona Wegers, Respondent's training supervisor, Ingram asked a question concerning the wearing of hard hats while employees were working on the loading dock. Wegers answered that no matter what the em-

<sup>1</sup> Respondent is now known as Conoco Phillips.

<sup>2</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to these findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

<sup>3</sup> Strachan has known Dan Ingram for over 20 years. At the hearing, Strachan admitted that he does not like Dan Ingram because Ingram is a "complainer."

<sup>4</sup> As will be seen below, I do not credit the testimony of Strachan and Brenda Hill, personnel services supervisor, that Davis attributed the offending remarks to Ingram. Strachan was not a credible witness and has a strong bias against Dan and Brandon Ingram. Hill was not a credible witness and simply attempted to support Strachan's evidence.

ployees might have heard, employees were required to wear hard hats when working on the loading dock. While Respondent attempted to characterize this incident as a major disruption by Ingram, in fact, Respondent encouraged employees to ask questions during training. Wegers quickly and unequivocally instructed the five probationary employees as to the proper equipment for working on the dock. It took Wegers less than a minute to answer Ingram's question and completely resolve the issue.

After approximately 3 weeks of basic operator training, the probationary employees were given training as operators. Ingram was assigned to the "off-plot" area of the refinery. In March 2002, Ingram finished his training as a loader. Ingram qualified as both a loader and diesel loader. Ingram asked Kelly Kendall, his leadman, based on having qualified as a loader and diesel loader, whether he was entitled under the collective-bargaining agreement to assistant operator II pay (a premium over the pay of a loader). Kendall told Ingram that this pay question was a "gray area" and that Ingram should raise the question with Respondent's management. Ingram asked Wegers whether he qualified for assistant operator II pay under the collective-bargaining agreement. Article 39 of the collective-bargaining agreement states, "Assistant Operator will be compensated at the entry rate until successfully qualifying on one (1) Assistant Operator position, at which time he/she will be awarded the Assistant Operator I rate. Successful qualification on two (2) operator positions will result in the award of the Assistant Operator II rate." Wegers told Ingram that she would check with Strachan because she was unsure herself.<sup>5</sup> Shortly thereafter, David Schmidt, Ingram's immediate supervisor, told Ingram that Ingram's job was whatever Schmidt told him to do. Schmidt said that if he wanted Ingram to perform diesel loader duties then that was part of Ingram's job duties. At the hearing, Respondent explained that the duties of the diesel loader were encompassed in Ingram's job as a loader. Thus, Ingram was not entitled to assistant operator II pay. At the hearing, Tim Murphy, Respondent's production manager, admitted that the training materials given to Ingram could reasonably lead one to believe that loader and diesel loader were two different jobs. Thus, Murphy admitted that Ingram's questions about whether he was entitled to assistant operator II pay were reasonable.

In February, Ingram informed Schmidt, Strachan, and Kendall that his wife Tanya Ingram was having complications with the pregnancy of their second child and that he might need to take time off with short notice. Ingram was told by fellow employee Wendy Wampler that he might qualify for time off under the Family Medical Leave Act (FMLA). Ingram sent Strachan an e-mail questioning whether he was eligible for leave under FMLA. Strachan did not respond to this e-mail.

<sup>5</sup> I do not credit Wegers' testimony that Ingram argued that he was entitled to higher pay than the diesel loader. Wegers was not a credible witness and seemed intent on mischaracterizing Ingram's words and conduct. For example, Wegers testified that Ingram was too quite and shy to work at a refinery. In addition, Wegers criticized Ingram for learning his training materials too quickly. I find Wegers was more concerned about arguing Strachan's case against Ingram than she was interested in truthfully testifying as to the facts.

After not receiving a response, Ingram called Strachan. Strachan told Ingram that the employee did not qualify for FMLA leave and Ingram did not inquire about FMLA leave again.

Thereafter, Wampler suggested to Ingram that he might qualify for leave under the Washington State Family Care Sick Leave Act (family care/sick leave). Ingram researched the issue on the Internet and spoke with other employees, including Rachele Honeycutt, union vice president, Mike Brown, workers committee member, Jeff Davis, and his father. Honeycutt and Brown indicated to Ingram that the Union was interested in supporting an employee request for leave under the State law. After his research and discussions, Ingram reasonably believed that he qualified for family care/sick leave under Washington State law.

Thus, in early March, Ingram contacted Strachan to ask whether he qualified for family care/sick leave. Strachan informed Ingram that the employee did not qualify for family care/sick leave and that Ingram would have to take vacation if he needed time off because of his wife's or baby's medical condition. Thereafter, Ingram asked Davis why he did not qualify for family care/sick leave. Davis was unable to give Ingram an answer. Thereafter, Davis contacted Strachan and Strachan wrote Ingram an e-mail stating that Ingram was not employed long enough to qualify for FMLA.

In early April, Ingram spoke with fellow employee Bob Huntleigh about his request for family care/sick leave. Huntleigh told Ingram that employees had problems in the past getting time off to care for family members. Huntleigh told Ingram that the Union was looking for a "test case" and encouraged Ingram to pursue his claim for family care/sick leave. In the past, the Union had taken the position that under article I of the collective-bargaining agreement, Respondent was required to grant benefits under Federal and State laws. The Union's position was that the Washington State family care/sick leave applied to Respondent. Respondent took the position that its sick leave policy did not fit the definition of an accrued plan under the Washington State law. Strachan was aware of the union position.

In early April, Dan Ingram gave Davis a printout from the Washington State Department of Labor that arguably showed that Brandon Ingram was eligible for leave under the Washington State law. Davis reported this incident to Strachan and Strachan again wrote Ingram an e-mail stating that Ingram did not qualify under the FMLA. Strachan also stated that Dan Ingram had copied certain of Respondent's policies from the company intranet but that those policies were not effective until January 2003.

On April 11, Tanya Ingram began having medical problems and was hospitalized. Ingram was scheduled to work on April 12 through April 15. Ingram called in sick on April 12 and again on April 13. On April 14, when Ingram attempted to take vacation time to attend to his wife and child, he was told that Respondent's policy was that an employee could not take vacation immediately after taking sick leave. Ingram was told to call his supervisor and he did. Schmidt told Ingram to take the time off and that they would straighten out the leave situation later. On April 15, Ingram called Davis and asked whether he

had been charged with sick leave or vacation for April 14. Davis answered that Ingram had been charged for vacation and suggested that Ingram also take vacation for April 15. However, Davis mistakenly changed the sick days of April 12 and 13 to vacation. Later when this was brought to his attention on April 19, Davis wrote Tim Murphy, production manager, Brock, and Schmidt and asked that April 12 and 13 be changed back to sick days.

When Ingram next reported to work on April 19, he was told by Supervisor Schmidt that the sick days of April 12 and 13 had been changed to vacation days. Ingram then wrote an e-mail to Strachan complaining that he had been charged for 4 vacation days. Ingram said that he had been sick and should have been charged 2 sick days and 2 vacation days. Ingram sent copies of this e-mail to Honeycutt and Davis. Ingram also sent an e-mail to Davis in which he mentioned that he had filed a claim against Respondent with the Washington State Department of Labor.<sup>6</sup> That same day, Ingram was called into a meeting with Schmidt and Bruce Brock, area superintendent, and Schmidt's supervisor. Mike Brown, union workman committee member, was present representing Ingram. Brock told Ingram and Brown that this was not a disciplinary meeting. According to Brock, Ingram had angered Strachan by pursuing a claim for family care/sick leave. Brock told Ingram that he should bring his questions or concerns to Brock and not contact Strachan. Further, Brock told Ingram that he was to follow the vacation/sick leave dictated by Strachan and that he was to use the chain of command and not to contact Strachan. Finally, Brock declared that Ingram was a good employee and that Ingram would have no troubles if he abided by the directions of this meeting. As a result of Davis' actions on April 19, Ingram was charged for 2 days of sick leave and 2 days of vacation. Two days later Schmidt filled out a monthly evaluation form for Ingram. Schmidt stated, "Brandon is a hard worker. He sets challenging goals for himself for each shift and usually accomplishes these goals." Schmidt further noted, "A meeting was held with Brandon and the Area Supervisor, Bruce Brock to remind him of the vacation/sick leave policy and use of the chain of command." Schmidt went on to recommend that Ingram be retained after his 6-month probationary period. In his February review of Ingram, Schmidt affirmed, "I think Brandon will make a fine operator. I will be glad to have him on my crew." Similarly, in his March evaluation of Ingram, Schmidt confirmed, "He is a welcome member of my crew." In that March evaluation, Schmidt noted, "Brandon has also volunteered for the oil spill team."<sup>7</sup>

On May 10, Ingram was discharged. The letter of termination states:

<sup>6</sup> Davis forwarded this e-mail to Murphy on April 24. Davis also notified Strachan on April 24 that Ingram had filed a claim with the Department of Labor.

<sup>7</sup> At the hearing, Respondent suggested that Ingram worked overtime and volunteered for the oil spill team for selfish reasons. This is another example of the attempts to mischaracterize Ingram's conduct. Clearly, Respondent's employees do not work for altruistic reasons. Ingram's volunteering for overtime and the oil spill team were seen as positive attributes prior to the instant case.

During new hire orientation, as the schedule clerk was informing you and other new hires about mandatory overtime, you advised attendees that all an operator has to do to avoid coming in for overtime is to tell the caller that you have been drinking.

During the initial weeks of your probationary period, you repeatedly deleted important e-mail without reading it. You received a note from HR to discontinue this practice.

During Basic Operator Training with the training supervisor, you openly disagreed with the PPE standard presented and advised the other attendees that a different standard really existed. As a result, the training supervisor had to cover the material again and inform the class that you were mistaken.

On another occasion, you indicated to the training supervisor that you should be paid Assistant Operator II pay, because you perform more work than the diesel loader. Had you taken the time to learn more about the facility and workforce, you would have known that some employees are working under ADA accommodations. And, you would be aware of the requirements to qualify as an Assistant Operator II.

You have indicated frustration with regard to the Company's time off policies, both through argumentative discussions with Company personnel and in writing to the Labor Relations Superintendent.

The termination letter was signed by Murphy and Brock. Thereafter, on May 13, Davis notified Strachan, Murphy and Kathleen Pennington, director of human resources, that he was upset because Ingram had not made the remark about avoiding mandatory overtime. Clearly, Davis would not have risked Strachan's antagonism if he was not telling the truth. However, Strachan insisted that Davis had told him that Ingram had made the remark about avoiding overtime.<sup>8</sup> Davis, knowing the truth, then went to Pennington, Strachan's supervisor, and told Pennington that Ingram had not made the remark at issue. Davis informed Pennington that the remark was made but not by Ingram. Pennington said that she had to support Strachan. Neither Strachan nor Pennington attempted to find out who really made the offending remark.

While Respondent discharged Ingram at the end of his probationary period it retained the four other probationary employees in the class. Two of these employees had performance problems and had to be reassigned. In addition, one of these two employees had "attitude" problems. Aside from Ingram, Respondent has not discharged a probationary employee in over 10 years.

#### Respondent's Defense

Respondent argues that a refinery is inherently a dangerous place and, therefore, safety is major concern. Certainly, there is

<sup>8</sup> At the hearing, Brenda Hill testified that Davis identified Ingram as the employee who suggested that drinking could be used as an excuse to avoid mandatory overtime. Hill was not a credible witness. She appeared intent on supporting Strachan and disparaging Ingram. She did not appear to be a candid or truthful witness.

no doubt safety at the refinery is important to Respondent, its employees and its neighbors. However, Respondent has not shown any connection between the discharge of Ingram and these serious safety concerns.

On April 9, Murphy notified Strachan, Brock and the supervisors of the four other probationary employees that the end of the probationary period was approaching. Murphy stated that he wanted a thorough evaluation of the employees. He stated that he did not want a poor operator or an operator with a poor attitude to get through the probationary period. Strachan responded that there were negatives on three of the five probationary employees. According to Strachan one employee had an attendance problem. Another employee was not learning his operation and needed "an attitude adjustment." Strachan stated, "Brandon Ingram gives our Schedule Clerk fits because he is an expert on the refinery already. So far he has not been right about any of his assertions. Brings to mind the concept of the apple not falling far from the tree. It is difficult to ascertain how good his performance is from the interim appraisals I have received thus far. It appears we have a definite budding attitude problem here. Attitude is a large part of a good workplace as we all know."

As if there was any doubt that the "attitude" that Strachan referred to was Ingram's attempts to obtain family care/sick leave, Strachan resolved that doubt in an e-mail dated April 19 in which he attached Ingram's e-mail complaining that he had been charged with 4 vacation days and stated, "This further demonstrates the attitude I am concerned about. It appears that regardless of the governing rules, Mr. Ingram is still very vocal about how he thinks things should be." Brock stated that he and Schmidt would meet with Ingram and "nip this in the bud." Brock then held the meeting with Ingram in which he told Ingram to accept Strachan's position on family care/sick leave and not to contact Strachan. Later that day, Strachan wrote an e-mail in which he complained that Ingram had made three attempts to get family care/sick leave. Strachan pointed out to Brock and two other supervisors that Ingram "is trying to get the Union involved already."

On April 22, Strachan wrote Murphy and complained that Ingram "is challenging us at every turn." Strachan further declared, "It throws up a huge red flag for me." Murphy responded, "Regardless of work performance, I do not believe we need a 'political activist' at work. I believe that we have a generous system and malcontents tend to stay that way." Strachan replied that he had just learned that Ingram had filed a claim against Respondent with the Washington State Department of Labor.

At the hearing, Murphy testified that even though the letter of termination lists Ingram's efforts to obtain assistant operator II pay under the contract and family care/sick leave under Washington State law, it was the other three reasons that caused the discharge. When confronted with the fact that those three incidents occurred 5 months before the discharge, Murphy pointed to the two reasons, assistant operator II pay and family care/sick leave, as the trigger for the discharge. When confronted with this inconsistency, Murphy testified that the assistant operator II pay and family care/sick leave would not have

been enough for a discharge by themselves.<sup>9</sup> When Brock learned of the impending discharge of Ingram in late April, he challenged Murphy on that decision. Allegedly, Murphy convinced Brock that discharge was appropriate. I am not persuaded that Brock was in any position to argue against Murphy and Strachan.

Respondent also produced Gary Goodman, refinery manager, as a witness. Goodman testified that safety was a major concern to him and Respondent. Goodman attempted to downplay the references in the termination letter to Ingram's attempts to obtain assistant operator II pay under the contract and family care/sick leave under the Washington State law. Goodman testified that he focused on the other three items in the termination letter. When confronted with the fact that those incidents occurred 5 months prior to the discharge, Goodman unbelievably contended that he didn't know when they occurred. It was clear from the face of the termination letter that, even if these events occurred, they took place prior to January 3, 2002. Goodman admitted that in approving the discharge he was really just relying on Murphy, his production manager.

#### Preliminary Conclusions

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

The Board has long held that employees who attempt to enforce the provisions of a collective-bargaining agreement are engaging in protected concerted activity. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), 388 F.2d 495 (2d Cir. 1967). The Supreme Court in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984), discussing the Board's *Interboro* doctrine stated:

The Board's *Interboro* doctrine . . . mitigates that inequality throughout the duration of the employment relationship, and is, therefore, fully consistent with congressional intent. Moreover, by applying Section 7 to the actions of individual employees invoking their right under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process, for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace.

The Supreme Court reasoned that it would not make sense "for a Union to negotiate a collective-bargaining agreement if

<sup>9</sup> The demeanor of a witness may satisfy the trier of fact, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies. I find Murphy to be such a witness. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

individual employees could not invoke the rights thereby created against their employer.” *City Disposal Systems*, 465 U.S. at 832. The Court further explained that when the employee invoked a right grounded in the collective-bargaining agreement, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from [the Employer] that they would not be asked to drive unsafe trucks. A lone employee’s invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

As the Board stated in *Lorac Construction Services*, 318 NLRB 1034, 1035 (1995):

In *City Disposal*, the Supreme Court endorsed the Board’s *Interboro* doctrine, which recognizes that an employee’s honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated. Second, the Court recognized that although the principal tool for invoking this right is the contract’s grievance machinery, another legitimate tool is an employee’s simple protest to the employer. Third, the Court concluded that, in voicing a complaint, the complaining employee need not explicitly refer to the collective-bargaining agreement as the basis for the complaint, but that as long as the nature of the employee’s complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing the agreement.

Ingram’s actions fall within *City Disposal*’s definition of concerted activity. First Ingram raised an issue, which Murphy conceded was reasonable, as to whether he was entitled to a higher wage rate under the collective-bargaining agreement, because he had been trained as a loader and a diesel loader. Thus, the collective-bargaining agreement required the Respondent to pay assistant operator II pay for an employee qualified to perform at two positions. Ingram did not know that Respondent considered the diesel loader position to be part of the loader position. The written materials given to Ingram appeared to indicate that these were separate positions. Ingram inquired of his leadman whether he was entitled to a premium. The leadman told Ingram to ask because he wouldn’t get anything unless he tried. Ingram asked Wegers, the training supervisor, who also did not know. Contrary to Respondent’s arguments, Ingram politely asked whether he was entitled to a higher pay rate and was told that he was not. Contrary to Respondent’s arguments, Ingram did not denigrate the work of the diesel loader.

The collective-bargaining agreement required the Respondent to comply with State and Federal laws. There was a legitimate question as to whether Ingram and other employees were entitled to benefits under the Washington State Family Leave Act. Other employees, including Wendy Wampler, Dan Ingram, Mike Brown, union committee member, Rochelle Honeycutt, union vice president, and Bob Huntleigh were also interested in resolving this issue for bargaining unit employees.

Murphy’s labeling of Ingram as a “political activist” is an admission that Respondent knew that Ingram was acting concertedly in seeking benefits under family care/sick leave. Strachan admitted that he knew that the Union was interested in obtaining rights under the Washington State law. Strachan expressed displeasure in the fact that Ingram sought to get the Union involved.

Under *City Disposal*, Ingram did not have to be correct in his position that there was a breach of the collective-bargaining agreement; nor was it necessary for him to file a formal grievance. The protection of the protected activity does not depend upon the merit or lack of merit of the grievance. *Skrl Die Casting, Inc.*, 222 NLRB 85, 89 (1976). Indeed, Ingram did not even have to invoke a specific provision of the agreement in voicing his complaints to the Respondent. Ingram merely had to honestly and reasonably invoke collectively bargained rights. *Lorac Construction Services*, 318 NLRB 1034, 1035 (1995). This is what Ingram did, and Respondent marked him for discharge for that reason.

Strachan’s e-mails reveal a belief that Ingram should not be retained because Ingram questioned the company’s policies about sick leave and was trying to get the Union involved. On April 9, Strachan complained that Ingram had an attitude problem and attributed that problem to the fact that Ingram was the son of Dan Ingram. Scrutiny of the evidence indicates that the “attitude problem” was the attempt by Ingram to obtain leave under the Washington State law and certain policies of Phillips Petroleum. On the morning of April 19, Strachan complained that Ingram was vocal about his attempts to obtain sick leave. Strachan asserted that Ingram was “trying to get the Union involved already.” In an April 19 e-mail Strachan gave Ingram’s attempt to obtain family care/sick leave as an example of what he meant by an attitude problem. Later that morning, Strachan admitted that Ingram’s field performance was okay.<sup>10</sup> However, Strachan believed that Ingram “failed miserably” at accepting policy and direction. By “accepting policy and direction,” Strachan meant questioning Respondent’s leave policy. On April 22 Strachan stated in an e-mail to Murphy, “this guy is challenging us at every turn. It throws up a huge red flag for me.” On April 24, Strachan informed Murphy and Pennington that Ingram had filed a “complaint” with the Department of Labor concerning sick leave.

Murphy’s e-mails also indicate the intent to discharge Ingram because of the employee’s protected concerted activities. As indicated above, on April 23, Murphy wrote an e-mail stating in pertinent part, “Regardless of work performance, I do not believe that we need a ‘political activist’ at work. I believe that we have a generous system and that ‘malcontents’ tend to stay that way.” There are a myriad of cases where code words and phrases—most frequently, “troublemaker,” see, e.g., *Kinder-Care Learning Centers*, 299 NLRB 1171, 1175 fn. 27 (1990); *Oak Ridge Hospital*, 270 NLRB 918, 919 (1984), but also “attitude,” see, e.g., *Bronco Wine Co.*, 256 NLRB 53, 54 (1981), have been held to be no more than euphemisms for union activist or sup-

<sup>10</sup> In fact, the evaluations submitted by Ingram’s supervisor indicate that Ingram’s performance was “good,” the second highest of five possible ratings.

porter, and union activity. Here, Respondent used “attitude,” “political activist” and “malcontent” as code words for Ingram’s attempt to obtain family care/sick leave under the Washington State law. Murphy’s “political activist” e-mail was in response to Strachan’s statements, “this guy is challenging us at every turn. It throws up a huge red flag for me.”

The letter of termination given to Ingram on May 10, 2002, lists his attempts to obtain operator II pay and his attempts to obtain family care/sick leave as the fourth and fifth reasons for the discharge. Respondent’s witnesses attempted to downplay the admissions contained in the letter of termination of May 10. Scrutiny of the letter buttresses the General Counsel’s *prima facie* case. The termination letter falsely accused Ingram of claiming he was entitled to more pay than the diesel loader. It stated, “Had you taken the time to learn more about the facility and workforce . . . you would be aware of the requirements to qualify as an assistant operator II.” In fact, Ingram had merely asked whether under the contract he was entitled to assistant operator II pay because he had qualified as a loader and diesel loader. As mentioned above, Murphy conceded that Ingram’s question was reasonable. Thus, this reason given to Ingram establishes that he was discharged, at least in part, or engaging in protected concerted activities. Having learned that such activity was protected under the Act, Respondent’s witnesses unconvincingly argued that this conduct played little or no part in the decision to discharge Ingram.

The last, but most important item in the termination letter stated, “you have indicated frustration with regard to the Company’s time off policies, both through argumentative discussions with Company personnel and in writing to the Labor Relations Superintendent.” This was, of course, the reason that Ingram was discharged. He had persisted in seeking family care/sick leave and had involved his father and the Union in his effort. By doing so, he had angered Strachan and jeopardized his employment. Astonishingly, Respondent’s witnesses attempted to testify that this conduct played little or no part in the decision to discharge Ingram.<sup>11</sup> For example, Murphy testified that Ingram was discharged because Respondent believed that Ingram would not follow safety procedures. Then Murphy testified that these matters were corrected. When asked what Ingram had done after the alleged safety matters were corrected, Murphy could only point to Ingram’s protected activity in questioning whether he was entitled to operator II pay under the contract and his attempt to claim family leave. Murphy had previously testified that these matters were not a factor in the discharge. When reminded that he had testified these matters were not a factor in the discharge, Murphy answered that they would not have been enough in themselves to justify discharge.

In *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the in-

ference that protected conduct was a “motivating factor” in the employer’s decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board’s *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983). Respondent argues that Ingram would have been discharged even in the absence of any protected activity.

As stated above, I find that General Counsel has made a strong *prima facie* showing that Respondent was motivated by unlawful considerations in discharging Ingram. Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of Ingram’s protected concerted activities. Respondent has not met its burden under *Wright Line*.

Respondent contends that as a refinery, safety is its major concern. There is no doubt that safety at the refinery is of the ultimate importance. However, there is no connection between Ingram’s discharge and safety. In Strachan’s e-mail of April 9, 2002, in which he lists the negatives of three employees, he mentions Ingram’s attitude but does not mention any alleged safety concerns. In an April 19 e-mail Strachan mentions Ingram’s attempt to obtain vacation and sick leave as an example of what he means by “attitude.” Strachan did not mention any alleged safety concerns in that e-mail. In another April 19 e-mail Strachan complains about Ingram’s attempts to get family care leave and the fact that Ingram got the Union involved. The alleged safety concerns are not mentioned in that e-mail. On April 23, Murphy called Ingram a “political activist” and a “malcontent” in response to an e-mail detailing Ingram’s attempts to obtain family care leave. Again, there was no mention of alleged safety issues. In an April 24 e-mail Strachan complained about Ingram having gone to the Washington State Department of Labor to seek family care leave. Safety is not mentioned in that e-mail either. I do not find any merit in Respondent’s argument that an employee seeking sick leave and going to the Union and the Department of Labor creates safety concerns to the refinery.

The true reasons for the vilification of Ingram appear to be Strachan’s strong dislike of Dan Ingram and Brandon Ingram’s attempts to obtain family care/sick leave. Respondent’s witnesses were more concerned with supporting Strachan and disparaging Ingram than they were in testifying truthfully. I do not credit the testimony of Murphy and Goodman that the incidents involving assistant operator II pay under the contract and family care/sick leave were not significant factors in the discharge. Their testimony was contradictory and unbelievable. They embarrassed themselves in an attempt to support Strachan and escape from damaging documentary evidence.

Respondent apparently contends that Murphy and Goodman had no knowledge of Strachan’s false allegation that Ingram told the other four probationary employees that they could avoid overtime by claiming that they had been drinking. However, knowledge of a supervisor is properly attributable to an employer. *Ready Mixed Concrete Co.*, 317 NLRB 1140 (1995); *Pinkerton’s Inc.*, 295 NLRB 538 (1989); and *Colson Equipment*, 257 NLRB 78 (1981). I find that the knowledge of

<sup>11</sup> Ingram’s performance evaluation of April 21 also made reference to Ingram’s request for family care leave and the fact that Ingram had made such a request to Strachan.

Strachan is attributable to Murphy and Goodman. Further, I find it irrelevant that Goodman may have had no unlawful motive. He approved the discharge pursuant to information received from Murphy and Strachan. Under such circumstances, the relevant motive would be that evidenced by Murphy's and Strachan's words and conduct. As stated above I find Respondent's conduct to be motivated by a desire to keep Ingram from concertedly complaining about terms and conditions of employment.

While Ingram did error in deleting e-mails on his third day of employment, that error was immediately corrected. There were no further incidents. Again, early in his training, Ingram asked a question indicating a belief that hard hats were not necessary in the dock area. However, the training officer quickly and unequivocally set the record straight. Absent an attempt by Strachan to justify the removal of Ingram, these minor incidents would not have been mentioned again. Moreover, Respondent had not previously discharged a probationary employee. Finally, on the same date that Respondent discharged Ingram, it retained one employee with attitude and performance problems and another employee with performance problems. Both of these employees had to be reassigned. If safety concerns were truly an issue, these two employees would have been considered greater safety risks than Ingram.

It is no defense that Respondent acted without union animus or a willful intent to violate the Act. The law is well established that when it is once made to appear from the primary facts that an employer has engaged in conduct which operates to interfere with an employee's statutorily protected right, it is immaterial that the employer was not motivated by antiunion bias or ill intentions." *Fabric Services*, 190 NLRB 540, 543 (1971). See also *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); and *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959). The test is whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Continental Chemical Co.*, 232 NLRB 705 (1977); and *American Lumber Sales, Inc.*, 229 NLRB 414 (1977).

To the extent that Respondent contends that Ingram was argumentative in pursuing assistant operator II pay and family care/sick leave I find no merit in that contention. The Board has held that grievance meetings are generally heated and emotional and an employee's outburst will be protected unless the conduct is indefensible under the circumstances. See, e.g., *Postal Service v. NLRB*, 652 F.2d 409 (5th Cir. 1981). See also *Illinois Bell Telephone Co.*, 259 NLRB 1240 (1982). Here, Respondent does not contend, and there is no evidence to support a finding, that Ingram engaged in insubordination or other indefensible conduct.

Where, as here, the General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). In the instant case, I find that Respondent's defense established further evidence of discrimination. Thus, I find that Respondent has failed to establish that Ingram would have been discharged absent his protected conduct. See *Bronco Wine Co.*, 253 NLRB 53 (1981); *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employee Brandon Ingram because of his protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Brandon Ingram, it must offer him full and immediate reinstatement to the position he would have held, but for his unlawful termination. Further, Respondent shall be directed to make Ingram whole for any loss of earnings and other rights, benefits and privileges, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to remove any and all references to its unlawful discharge of Ingram from its files and notify Ingram in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER

The Respondent, Conoco Phillips (formerly Phillips Petroleum Company), Ferndale, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees in order to discourage activities protected by Section 7 of the Act.

(b) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Brandon Ingram full reinstatement to his former job or, if that job no

<sup>12</sup> All motions inconsistent with this recommended Order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed but for his unlawful discharge.

(b) Make Ingram whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful discharge against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any and all reference to the unlawful discharge of Ingram and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Ferndale, Washington, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since May 10, 2002.

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f). Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

#### APPENDIX

##### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge employees in order to discourage activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Brandon Ingram to the position he would have held, but for his unlawful discharge.

WE WILL make whole Brandon Ingram for any and all losses incurred as a result of our unlawful discharge, with interest.

WE WILL remove from our files any and all references to the unlawful discharge of Brandon Ingram and notify him in writing that this has been done and that the fact of this unlawful discipline will not be used against him in any way.

CONOCO PHILLIPS COMPANY (FORMERLY PHILLIPS PETROLEUM COMPANY)